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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-281

JULIAN S.H. WEINER, and
SOLOMON BLOCK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court Of Appeals for the Ninth Circuit entered herein on May 15, 1978.

OPINIONS AND ORDER BELOW

The Opinion and Order of the United States Court of Appeals for the Ninth Circuit has not been officially reported and is printed as Appendix A. The Order of the Ninth Circuit denying the Petition

For Rehearing and the Suggestion for Rehearing En Banc, filed July 21, 1978, is printed as Appendix B.

All of the appendices are included in a separately presented submission because of their voluminous nature.

JURISDICTION

The Opinion of the Court of Appeals was filed on May 15, 1978. A timely Petition for Rehearing and Suggestion for Rehearing En Banc were filed by the Petitioners and was denied on July 21, 1978. Jurisdiction of the United States District Court was based on 18 U.S.C. § 3231; the jurisdiction for the appeal to the Court of Appeals for the Ninth Circuit was based upon 28 U.S.C. § 1291 and § 1294.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1) and Rule 19(1)(b).

QUESTIONS PRESENTED

Whether petitioners' constitutional rights to a fair trial, to due process of law and to a unanimous jury verdict were invaded when the Court refused to grant the Motion for New Trial on the ground

that a juror's affidavit, which contained a written copy of her ballot read in the jury room, was not admitted since it would impeach the verdict.

Whether petitioners' constitutional right to trial by jury was infringed by the giving of the Allen instruction in the plural, or at all, when the District Judge knew that only one juror was dissenting.

Whether this Court's holding in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) precludes the giving of a jury instruction which provides a negligence test as an alternative ground for guilt, which does not require knowing, willful or intentional conduct as to a material fact for the jury to find guilt and which does not require the application of the standards of the profession in a criminal prosecution under the Federal Securities laws.

FEDERAL REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are Article 3, § 2, clause 3 of

the Constitution and the Fifth, Sixth and Seventh Amendments to the United States Constitution. They are printed in 1 U.S.C. XLVI.

STATEMENT OF THE CASE

On November 1, 1973, petitioners were indicted for violations of the Federal Securities laws in the preparation of registration statements and the filing of financial reports with national stock exchanges based upon 15 U.S.C. § 77 q(a) 77 x, 77 f, 78 l and 78 m. Petitioners pleaded not guilty to the indictment on November 26, 1973. Trial began on January 7, 1975, before the Honorable Jesse W. Curtis, United States District Judge, and, on May 20, 1975, after 69 trial days Petitioner Weiner was found guilty on the ten counts submitted to the jury as to him and Petitioner Block was found guilty on seven of the nine counts submitted to the jury as to him. On July 14, 1975, Petitioners' Motions For Judgment Of Acquittal and for a new trial were denied by Judge Curtis. A Notice Of Consolidated Appeal was filed by petitioners and by Marvin Lichtig, a co-defendant, on July

24, 1975. On May 15, 1978, the Opinion of the Court of Appeals for the Ninth Circuit was filed which affirmed the judgment of conviction. On May 26, 1978, petitioners filed a Petition for Rehearing with a Suggestion for Rehearing En Banc, which was denied by an Order of the United States Court of Appeals for the Ninth Circuit, filed on July 21, 1978.

After five days of jury deliberations, which began on May 8, 1975, at 9:30 A.M., (R.T. 61 p. 5264),[1/] the jury foreman sent a note to the District Judge stating:

> "After considerable deliberations one of the members of our jury feels unable to participate in deliberations with the rest of us." (R.T. 61, p. 5268).

The Court stated its intention to inquire into the physical and mental condition of the juror and if the juror did not wish to deliberate further, to give the "Allen Instruction". (R.T. 61, p. 5268).

The jury was brought into court and the judge asked the foreman:

1/ Refers to the Reporter's Transcript volume and page number.

"If I were to instruct all the members of the jury again, that is that it is your duty to deliberate and consult with one another in an effort to reach a verdict, that if that admonition were given, Mr. Flores, do you think there is a reasonable chance that you could proceed with your deliberations and reach a verdict?" (R.T. 61, p. 5271).

The jury foreman replied in the negative (R.T. 61, p. 5271) and the judge immediately read an Allen Instruction to the jury, which instruction is set forth verbatim in Appendix C hereto (R.T. 61, p. 5271-75). The instruction given varied from the instruction contained in Section 17.18, Devitt & Blackmar, Federal Jury Practice And Instructions (Supplemental Instruction--When Jurors Fail To Agree Seasonable). The jury deliberated for an additional hour thereafter and was then excused for a 4-day recess. On May 19, 1975, the jurors deliberated the full day, the jury foreman indicating his belief that the jury would be able to reach a verdict and do so within a reasonable time. The next day, a verdict was returned in the afternoon (R.T. 61, p. 5280-5283).

Immediately following the verdict, Juror Mary Krueger advised defense counsel that she wished to see Judge Curtis and was having difficulty finding him. Counsel arranged for her to see Judge Curtis immediately and were excluded from the Judge's chambers while the juror spoke to the Judge. According to Juror Krueger's affidavit of May 27, 1975, which is a part of the record below and which is submitted under separate cover as Appendix B, she always voted "guilty with a reservation" by which she meant that the defendants were not guilty; that she had voted that way consistently; had never changed her vote; and that the jury had always understood that that meant the equivalent of "not guilty". Following the reading of the variant "Allen Instruction" she felt that the jury was forced to come out with a verdict and she agreed to the jury reporting in a verdict with the understanding that she could explain to the Court that her "guilty with a reservation" meant "not guilty" in her mind. As her ballot on final vote she read a detailed written statement to the jury explaining how she felt and that she believed the defendants

"not guilty" and that "guilty with a reservation" had that meaning. That letter in her original handwriting and a transcription thereof are attached to her affidavit contained in Appendix D hereof and was before the District Court on Petioner's Motion For Acquittal and for a New Trial and was part of the record in the Court of Appeals. When the jury was polled, the question was not in the form that she had anticipated. Instead of the clerk asking was her vote "guilty" or "not guilty" she was asked whether this was the jury verdict. Caught by surprise, she hesitated and then said "yes". She then informed Judge Curtis of this and Judge Curtis, according to Juror Kreuger's affidavit, told her not to flay herself; to go home; to forget about it; not to talk to defense counsel; and offered that she could go out the back way. This was despite the fact that Miss Kreuger had shown Judge Curtis the written statement that she had read to the jury as her ballot on the final vote. Appendix E, submitted under separate cover, is the Affidavit of Juror Armando Carrillo and submitted under cover as Appendix F is

the Affidavit of Juror Charles Flores. Both of these affidavits substantiate Juror Kreuger's statements in her affidavit, both of which were before the District Court on Petitioner's Motion For Acquittal and For A New Trial and were part of the record in the Court of Appeals.

On Petitioners' Motion For Acquittal and For New Trial Judge Curtis refused to consider the affidavits of Jurors Krueger, Carillo and Flores on the theory that such affidavits were not admissible to impeach the jury's verdict. The Court of Appeals affirmed Judge Curtis.

At the hearing on Petitioners' Motion For Acquittal and For New Trial, Judge Curtis indicated that the facts as presented in the Krueger Affidavit as they related to his conversation were essentially true. The government did not file any affidavits in opposition to the Krueger, Carrillo or Flores affidavits and, presumably, there was no juror who could or would refute what was stated in those affidavits.

Footnote 28 to the opinion of the

Court of Appeals (Appendix A submitted under separate cover) contains substantially all of jury instruction No. 35. The pertinent portion thereof reads:

> "While I have stated that negligence or mistake does not constitute guilty knowledge or intent, nevertheless, ladies and gentlemen, you are entitled to consider in determining whether a defendant acted with such intent if he deliberately closed his eyes to the obvious or to the facts that certainly would be observed or ascertained in the course of his portion of the accounting works, or whether he recklessly states as facts matters of which he knew he was ignorant."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The reasons for granting the Writ as amplified in the argument following are:

The decision of the Trial Court and the Court of Appeals below in refusing to admit the Kreuger, Carillo and Flores affidavits to show the latent defect in the jury verdict conflict with the decisions of the Second Circuit in Jorgensen v. New York Ice Machinery Corporation, 160 F. 2d 432 (C.A. 2, 1947), with the decision

of the Court of Appeals for the Sixth Circuit in Felton v. Spiro, 78 Fed. 576 (C.A. 6, 1897) and with the decision of the District of Columbia Circuit in Fried v. McGrath, 135 F.2d 833 (D.C. Cir. 1943), and denied these petitioners thereby their right to a fair trial, due process of law and a unanimous jury verdict, all as required by Article 3, § 2, Clause 3 of the Constitution and the Fifth, Sixth and Seventh Amendments to the Constitution.

The decision of the Court of Appeals below in affirming the giving of the Allen Instruction conflicts with the decisions of the Third Circuit in United States v. Fioravanti, 412 F.2d 407 (C.A. 3, 1969) cert. den. sub. nom. Panaccione v. United States, 369 U.S. 387 (1969), of the Seventh Circuit in United States v. Brown, 411 F.2d 930 (C.A. 7, 1969) and of the District of Columbia Circuit in United States v. Thomas, 449 F.2d 1177 (D.C. Cir., 1971). The coercive aspects of the Allen Instruction, as exemplified by the facts in this case, deprives a criminal defendant of the rights afforded him by the Constitution of the United States to a fair trial.

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) establishes that more than mere negligence is required for accountants who have prepared registration statements to be held civilly liable for violation of the Federal Securities Laws. For criminal liability to attach to accountants similarly situated, more than even recklessness must be shown and a jury instruction which does not require willfulness as to a material fact and which is not related to the standards of the profession deprive such defendants of their liberty without due process of law.

ARGUMENT

I

THE DISTRICT JUDGE DEPRIVED THE DEFENDANTS OF THEIR RIGHT TO A FAIR TRIAL AND TO A UNANIMOUS VERDICT WHEN HE FAILED TO GRANT THE MOTION FOR NEW TRIAL WITH KNOWLEDGE OF THE LATENT DEFECT IN THE JURY VERDICT WHICH RENDERED IT NON-UNANIMOUS

Juror Kreuger's affidavit (Appendix D) and the affidavits of Jurors Carrillo and Flores (Appendix E and Appendix F) attest that Juror Kreuger always voted

not guilty and never voted guilty on any jury ballot. Attached to Juror Kreuger's affidavit is the statement which comprised her ballot on the final vote. It states:

> "As I stated several times before I do not doubt that the defendants did what they did, such as sign the registration statements, but I do not think that what they did constitutes criminal intent, that they were altogether knowing participants in the fraud, that these were holes in the government's case. You based your case on the evidence you imputed to the charges; I based mine on negative proof, on the insufficiency of your case to mine, to the over-reaching doubt in my mind. I do not have a reasonable doubt, but more than a reasonable doubt. I believe they are only guilty of negligence, malfeasance, and general slobbery which are subject to civil suit."

Juror Kreuger's affidavit states:

> ". . .at no time did I vote 'Guilty' for the defendants, but rather voted 'Guilty with reservation', and my ballot was so marked and I so informed the jury. . . . I did not then think that the defendants were guilty at the time of the vote, including the final vote. I did not think that we reached a unanimous verdict of Guilty. I have not ever thought they were

Guilty, and do not now believe them to be Guilty. I wish to reiterate that I never voted 'Guilty.' I voted 'Guilty with reservation' which to me was the equivalent of meaning I had inordinate doubt as to their Guilt, which in the eyes of the law I thought would be equivalent to innocent, and would be the equivalent of a 'Not Guilty' vote . . . .I expected the foreman to report a vote of 11 'Guilty' and 1 vote 'Guilty with Mary's explanation.' (I understood this to mean my 'reservation') which I expected to explain meant 'Guilty with an inordinate doubt' ('Not Guilty') had I been given the opportunity . . ."

So also the affidavit of Juror Carrillo:

"The final vote was read by the foreman as 'Eleven Guilty, One Guilty with Reservation.' I questioned that this was not a unanimous decision and a debate ensued thereon. The jury never voted on whether the final vote of 'Eleven Guilty, One Guilty with Reservation' should be reported to the court as a unanimous guilty verdict. I always understood Mary Kreuger's vote to be, in fact, a 'Not Guilty' vote. . . ."

Rule 31 of the Federal Rules of Criminal Procedure indicates that "the verdict should be unanimous". More importantly, this Honorable Court in Andres v. United

States, 333 U.S. 740, 748-749 (1948) said:

"Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."

This Court has often reiterated that the Sixth Amendment requires a unanimous jury verdict to convict in a Federal criminal trial. Apodaca v. Oregon, 406 U.S. 356 (1972); American Publishing Company v. Fisher, 166 U.S. 464 (1897); Springville v. Thomas, 166 U.S. 707 (1897); Maxwell v. Dow, 176 U.S. 581 (1899); Patton v. United States, 281 U.S. 276 (1930).

Not only was there not a unanimous verdict, but the jury foreman failed to report a proper verdict to the court when he failed to advise the court of the nature of the ballot cast by Juror Kreuger on the final vote. Had Juror Kreuger waited several weeks or even several days before attempting to see the District Judge to advise him of the error, it would be easy to assume that Juror Kreuger had a change of heart or was feeling remorse. However, Juror Kreuger saw the District Judge immediately after the

jury was discharged in an effort to correct the obvious latent defect in the jury verdict.

> ". . .Where the jury's error is patent on the face of the verdict, the court should so amend the verdict as to make it conform to correct legal principles. But where the mistake is latent in and not apparent on the face of the verdict, it is sometimes proper to receive the affidavits of the jurors to ascertain their true verdict. Although great caution should be exercised in the use of such affidavits, there is no inflexible rule against their use, especially when they are offered, not for impeachment of the verdict, but rather for ascertainment of the true verdict. The distinction between cases where the affidavits of jurors will not be received and cases where they will be received goes not to the 'types of cases in which proof may be offered, but rather goes to the question of what it is the moving party offers to prove.'"
> Fried v. McGrath, 135 F.2d 833, 834 (D.C. Cir., 1943).

In Fried v. McGrath, supra, it was a week after the verdict was returned in court that four jurors presented affidavits seeking to explain the verdict. Although that was a civil case, in which only money was at stake, it's reasoning

is more compelling in the instant criminal prosecution.

In United States v. Reid, 12 How. 361, 366 (1851), this Court stated:

> "The first branch of the second point presents a question of whether the affidavits of jurors impeaching their verdict ought to be received. It would perhaps hardly be safe to lay down a general rule upon the subject. Unquestionably such evidence ought always to be received with great caution, but cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice."

Judge Learned Hand in Jorgensen v. New York Ice Machinery Corporation, 160 F.2d 432, 435 (C.A. 2, 1947) openly ridiculed the notion that jurors' affidavits may not "impeach their verdict" when the verdict must be "impeachable" if what the affidavit says is true. In Felton v. Spiro, 78 Fed. 576 (C.A. 6, 1897) the court reversed the judgment because the jurors' affidavits were not received and considered by the court. In Mattox v. United States, 146 U.S. 140 (1892), this Court stated:

> "Public policy forbids that a matter resting in the personal

consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony, it gives to the secret thought of one the power to disturb the expressed conclusion of twelve. Its tendency is to produce bad faith on the part of the minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict, but as to overt acts, they are accessible to all the jurors. If one affirms misconduct, the remaining eleven can deny. One cannot disturb the action of twelve; it is useless to tamper with the one for the eleven may be heard. Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury and not alone within the personal consciousness of one."

The three jurors' affidavits contained in the appendices hereto attest to an overt act and a fact which occurred in the jury room and not to some personal belief of a single juror withheld from the ken of the others. These affidavits unmistakably show that an erroneous verdict and a nonunanimous verdict was reported to the court which resulted in the

conviction below. As noted in 6 A Moore's Federal Practice § 59.08[4] (2nd ed. 1974),

> ". . .[J]urors are competent witnesses for the purposes of showing that through oversight, inadvertence, or mistake respecting the substance of the verdict returned in the court, it was not the verdict on which agreement was actually reached in the jury room."

And as this Court has noted in McDonald v. Pless, 238 U.S. 264, 267-268:

> ". . .It would not be safe to lay down any inflexible rule because there might be instances in which testimony of jurors could not be excluded without 'violating the plainest principles of justice'. This might occur in the gravest and most important cases. . . ."

We note that since the Federal Rules of Evidence were not in force at the time of this trial, that they, and, particularly, Rule 606(b) thereof do not apply. Accordingly, the affidavits should have been admitted and a new trial should have been granted. That failure on the part of the District Court deprived these petitioners of the rights accorded them by the U.S. Constitution and by the Fifth, Sixth and Seventh Amendments thereto.

II

THE COERCIVE IMPACT OF THE ALLEN INSTRUCTION DEPRIVED THE DEFENDANTS OF DUE PROCESS OF LAW, THEIR RIGHT TO A FAIR TRIAL AND THEIR RIGHT TO A HUNG JURY. THE ALLEN INSTRUCTION GIVEN WAS COERCIVE AND PREJUDICIAL SINCE IT WAS IN THE PLURAL WHEN THE DISTRICT JUDGE KNEW THAT THERE WAS ONLY ONE DISSENTING JUROR. IT IS IMPROPER FOR A DISTRICT JUDGE TO GIVE THE ALLEN INSTRUCTION IN ANY FORM WITHOUT AFFORDING THE DEFENSE COUNSEL AN OPPORTUNITY TO OBJECT THERETO.

Before elaborating on the foregoing point, we note that the decision below respecting the use of the Allen Instruction departs not only from the decision in United States v. Fioravanti, 412 F.2d 407 (C.A. 3, 1969), Cert. den. Sub. Nom. Panaccione v. United States, 396 U.S. 837 (1969); United States v. Brown, 411 F.2d 930 (C.A. 7, 1969); and United States v. Thomas, 449 F.2d 1177 (D.C. Cir., 1971), but also from the decisions of the highest courts of 23 states, including the State of California in the case of People v. Gainer, 19 Cal.3d 835, 139 Cal. Rptr. 861, 566 P.2d 997 (1977). The

court is respectfully referred to footnote 8 of the latter opinion for the states in which the Allen Instruction has been disapproved. We note that a criminal defendant charged in a Federal Court in the State of California is placed in the anomalous position of being subjected to the Allen Instruction under the decisions of the Court of Appeals For the Ninth Circuit in the instant and other cases, while had he been placed on trial for a similar criminal charge in a State court of the State of California he would not be subjected to the Allen Instruction. Clearly it is time to bring the Federal Rule in conformity with the State Rule as well as to resolve the conflict existing between the Federal Circuits.

The Allen Instruction was given in this case after the District Judge knew that only one juror was dissenting (R.T. 61, p. 5268). Without giving defense counsel an opportunity to hear the form of the Allen Instruction to be given, the court read it to the jury. The confusion and dilemma which it produced in the mind

of Juror Kreuger is evident from her affidavit and ballot contained in Appendix D hereto. Defense counsel, when the Trial Judge stated that he would give the Allen Instruction after receiving the jury forman's note as to the deadlock, objected to the giving of that instruction because it was still too early for the Allen Instruction. But the Judge stated he would give the instruction because he knew of "no other alternative" [R.T. 61, p. 5269-5270]. See also [R.T. 10, p. 1738, R.T. 22, p. 348, R.T. 39, p. 2095]. To have launched directly into the Allen Instruction without defense counsel having the opportunity to hear the proposed instruction outside the presence of the jury and to object to it directly seems to clearly violate the prohibition contained in Rule 30 of the Federal Rules of Criminal Procedure (18 U.S.C. Rule 30).

The instruction as given commands "each dissenting juror" to reassess the reasonableness of his doubt and commands minority dissenting jurors ("other jurors") "to doubt" the correctness of their "judgement" and to "distrust" the

evidence which fails to convince their fellow jurors. The error of making "majority" and "minority" references is compounded here because it was thereby directed to "each dissenting juror" when the Trial Judge knew there was only one dissenting juror, and he never "balanced" the charge by commanding the eleven jurors to give deference to the opinion of the one dissenting juror and because it was specifically addressed only to the juror who was voting for acquittal. (See Appendix C.) The singularly inept choice of the plural form of address when everyone in the courtroom knew that the vote was eleven to one, told everyone that the instruction was directed solely to the one dissenting juror and not to the other eleven jurors.

To make matters worse, the instruction compels each dissenting juror "for acquittal" to reassess "his or her" mind, whereas "other jurors" for conviction are to reassess their position only if it is not concurred in by "many" or the "minds" of "several" of their "fellows". It was evident that there was no "many" or

"several" who could possibly be voting for acquittal. Everyone knew the vote was eleven to one. This instruction was directed in the singular solely to the juror voting for acquittal, yet in the plural to those for conviction but only upon condition that "many" or "several" were voting for acquittal, which was not the case. The effect, therefore, on those jurors voting for conviction, who were to reassess their position only if a plurality of jurors were voting for acquittal was that those voting for conviction could safely ignore the instruction. Not so, however, for the lone dissenting juror for acquittal, who had been thus singled out by the specific address of the instruction. That that form of instruction was inherently coercive to the lone dissenting juror for acquittal is evidenced by her rapid capitulation and her ballot and affidavit as contained in Appendix D. As the California Supreme Court stated in People v. Gainer, supra, at 847-849:

> "One of the basic ingredients in our traditional concept of a fair trial is the circumscription

> on that which the trier of fact may consider in reaching a verdict. . . . This rule applies not less to juries than to judges, and the decisions of both this court and the United States Supreme Court reflect the importance of restricting the foundation for the jury's decision to the evidence and arguments presented at trial. . . . An equally significant principle relates to the right of both the People and the defendant to the individual judgment of each juror on the issue of guilt. . . . Yet in instructing that 'a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one, which makes no impression on the minds of so many men or women equally honest, equally intelligent with himself or herself,' the trial judge pointedly directs the jurors to include an extraneous factor in their deliberations, i.e., the position of the majority of jurors at the moment. The one or more 'holdout' jurors are told that in reaching their independent conclusions as to whether or not any reasonable doubt of the defendant's guilt exists, they are to weigh not only the arguments and evidence and also their own status as dissenters--a consideration both rationally and legally irrelevant to the issue of guilt. They are

> thus deflected from their proper role as triers of fact, as effectively as if they had been instructed to consider their doubts as to guilt in light of their own prejudices or desire to go home. . . . Moreover, the extraneous majoritarian appeal contained in the Allen Instruction interferes with the jury's task in a way which threatens the defendant's right under the California Constitution to have his guilt or innocence determined by the unanimous verdict of the jury of 12 persons. . . . The open encouragement given by the charge to such acquiescence is manifestly incompatible with the requirements of independently achieved jury unanimity."

So also does the Allen Instruction violate the United States Constitution and this court should grant Certiorari to disapprove of the Allen Instruction in all of it's variants.

III

A CRIMINAL CONVICTION FOR VIOLATION OF THE FEDERAL SECURITIES LAWS BASED UPON AN INSTRUCTION STATING A NEGLIGENCE STANDARD VIOLATES THE PRESUMPTION OF INNOCENCE AND SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT.

Petitioners' convictions stem from violations of Rule 10b-5 of the Securities Exchange Act of 1934 [17 C.F.R. § 240.10 b-5] and § 17a of the Securities Act of 1933 [15 U.S.C. § 77q(a)]. § 17a of the Securities Act of 1933 has virtually the same language as Rule 10b-5. This Court in Ernst & Ernst v. Hochfelder, supra, held that for an accountant to violate § 10b-5 of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder the accountant must be quilty of knowing or intentional misconduct. This Court therein did not make negligence or recklessness a test of civil liability. How much more stringent must be the requirement for criminal liability to attach to an accountant for an alleged violation of that same Section and Rule?

Jury Instruction Number 35, set forth in the opinion of the Court below in footnote 28, (See Appendix A) imposed a negligence standard for guilt in a criminal case since it permitted the jury to infer intent form ". . . reckless, deliberate indifference. . . ." After defense counsel's argument to the instruction, the court stated:

> "It seems to me we are talking about three situations, one, where he acted knowingly and willfully and, again, where he acted recklessly where he didn't act willfully and knowingly. That why I consider the other situation as separate and apart from this instruction." [R.T. 53, p. 4028].

At the sentencing the Trial Judge remarked on his own doubts as to Petitioners' knowledge:

> "I do not feel that these defendants are culpable to the extent that the executives were culpable in fraud. These defendants, I think, came into the picture late, that is, they came into the fraud late, they were in the first stages badly misled, I think because what they thought was knowledge of the company and the people involved, they were led into serious error, some serious negligent conduct." [R.T. 62, p. 5303].

Also significant is the Trial Court's language at R.T. Volume 61, p. 5184

> "Well, we have got 'recklessly'. Now, 'recklessly', I objected to it the other day because it did not mean anything. But it does mean something. It means in the ordinary language of the street negligence plus. And I think that if you said that he negligently, even, stated as facts matters of which he knew he was ignorant, it depends upon the degree of negligence."

Yet, in Hochfelder, supra, this Court decried negligence as a test for determining a violation of the Federal Securities Laws and held that the words "manipulate" or "deceptive" in conjunction with the words, "device" or "contrivance" solely implies intentional misconduct. Unfortunately, the Court below did not believe that standard applicable to a criminal prosecution.

Petitioners were, thereby, subjected to criminal liability by an instruction which could create in the juror's minds that negligence alone was sufficient. There was no limiting instruction dealing with the standards of the accounting profession in effect at the time of the

audits in question and there was no expert testimony, based on factual evidence, to support a violation of audit standards or direct knowledge of Petitioners of the fraud at Equity Funding. The Statement on Auditing Standards of the American Institute Of Certified Public Accountants states that the financial statements are the responsibility and representations of management; do not place an obligation upon an auditor to discover fraud in the ordinary audit and note that a subsequent discovery that fraud existed during the period covered by the independent auditor's examination does not of itself indicate negligence on his part. [Statement on Auditing Standards, Sections 110.01-09]. Management's responsibility for the preparation and accuracy of its financial statements has long been recognized by the Securities and Exchange Commission, which body has also recognized the judgmental aspect of the accountant's expression of an opinion on a financial statement for what it is and not as a substitute for the truthfulness or lack of truthfulness contained therein as a

result of management's representations or misrepresentations:

> "The fundamental and primary responsibility for the accuracy of information filed with the Commission and disseminated among the investors rests upon management. Management does not discharge it's obligation in this respect by the employment of independent public accountants, however reputable. Accountants certificates are required not as a substitute for managements accounting of it's stewardship, but as a check on the accounting." [4 S.E.C. 721 (1939)].

Yet nowhere in the jury instructions was this brought home to the jury. Instead, negligence was made the test.

Touche, Ross & Company, a national accounting firm, was engaged by the Trustee in Reorganization for Equity Funding Corporation Of America to audit the company, determine it's financial condition and the extent of the fraud. The trustee paid to Touche, Ross & Company $2,000,000.00 for it's work. Touche, Ross met with the very officers of Equity Funding who perpetrated the fraud and who pointed out the fraud to Touche, Ross.

Touche, Ross employed 70 men for 10 and 1/2 months to conduct a fraud audit after Equity Funding's demise but did not even review the work papers for the audits which resulted in the financial statements for the falsity of which Petitioners were charged with a crime [R.T. 37, p. 1653, 1658 and 1744].

Norman Grosman, a Partner at Touche, Ross, testified as the government's only expert accounting witness. He testified that the percentage of verification of the funded loans receivable account, (assuming no fraud had been discovered), which had been 5% or 6%, would have been sufficient under normal conditions and that the percentage amount was predominantly a judgmental decision. Grosman admitted that auditors do not prepare the financial statements; all they do is render an opinion based on the statement prepared by the company. Grosman stated that there is a basic assumption made that the company management tells it's auditors the truth, and said:

> "You assume things to be right if somebody tells you . . . you make tests according to the systems . . .

> "Since auditing is not a science, I did not review the working papers of the auditors so I would not have had occasion to check for confirmation problems, . . ."

Grosman stated also that the most thorough fraud audit might not necessarily pick up fraud where there is collusion by internal management. And, in fact, a similar occurrence had transpired at Touche, Ross in the case In Re U.S. Financial Securities Litigation, Federal Securities Law Reporter, ¶ 94,484. No Touche, Ross auditors had been indicted in that case [R.T. 37, p. 1661, 1638, 1675, 1723, 1724 and 1744].

Not one professional person who testified in connection with any of the audits involved even indicated that either of the Petitioners ever instructed anyone not to look for certain evidence, not to pursue any course of audit investigation or not to review any documents. On the contrary, each of the auditors who had participated in the audits concerned, testified clearly that they were never told not to look at any documents, never told not to pursue any area and that they

were left completely free to conduct the audit in a manner calculated to ascertain the facts. In fact, the government's witness, John Templeton, admitted that the auditors tried to gain access to all records and that he and Goldblum (President of Equity Funding) and others talked about means of hiding the facts from the auditors [R.T. 12, p. 2090, 40, p. 2245, 41 p. 2349, 2379 and 2404].

We note that Haskins & Sells, Coopers & Lybrand, Tate Weller & Clark, Seidman & Seidman, Peat, Marwick & Mitchell and Alexander Grant & Company, among others, all national accounting firms who audited various of the Equity Funding subsidiaries, including Equity Funding Life Insurance Corporation Of America (the fraud in which overshadowed the fraud in the parent company Equity Funding) failed to find any fraud in this maze despite the smaller and more concentrated areas of the audit which they performed. Their audit reports were presented to Petitioners for inclusion in the overall financial statements for Equity Funding Corporation.

It is clear that what the government intended for in this case and what was given by way of Jury Instruction No. 35 was a hindsight review of a fraud which suddenly came to light in 1973 and which demonstrated that management's ability at deception was more powerful than the auditing tools available to the accounting profession.

The accounting community is distraught over judicially imposed liability for management fraud which is not the purpose nor function of the independent auditor to discover. In that the:

> "Expanding exposure to criminal liability has aroused the accounting profession's ire . . . this anger within the profession stems primarily from the feeling that the courts, basking in the luxury of hindsight, misunderstand the public auditor's role . . . [in] complete disregard of . . . professional [Accounting] standards. . . . [Accountants] feel that besides being at odds with professional thinking, court-evolved standards for determining criminal responsibility are vague, and thus leave the man in the field with little guidance on how to avoid criminal liability." Comment, Criminal Liability of Public Accountants: "A Lurking Nightmare?" 67 Journal of Crimes and Criminality, 32-33 (1976).

Emphasizing that there has never been a general codification of generally accepted accounting principles, the foregoing comment notes that:

> ". . . [T]he identification of an accounting principle as generally accepted in particular circumstances requires judgment. No single source of reference exists for all established accounting principles." AICPA, Statement On Auditing Standards, No. 5, §5 (1975).

In light of the admissions of government witnesses that Petitioners' audit staff did in fact follow generally accepted accounting standards and generally accepted accounting principles in the year end audits and admission by the government's purported accounting expert that auditing is often a matter of "judgment", it was error to give the negligence instruction without limiting it as to actual knowledge, intentional conduct and standards of the accounting profession [R.T. 25, p. 854, 865; R.T. 24, p. 750, 770, 704; R.T. 37, p. 1661, 1700 and 1724; R.T. 24, p. 771]. Government accounting experts likewise conceded that accounting and auditing standards were in a

constant state of flux throughout the time periods contained in the indictments. Other government witnesses testified unequivocably that the independent auditors, including petitioners, did in fact follow generally accepted accounting and auditing standards and procedures in their work on the financial statements which are the basis for the indictment below (R.T. 22, p. 220; R.T. 24, p. 769-771, 750, 754, 784; R.T. 25, p. 854].

Accountants should not be held to a standard higher than that recognized by their profession. Escott v. Bar Chris Construction Corp. 283 F.Supp. 643 (S.D. N.Y., 1968). Since accounting is not a science, but only an art, and since the auditing standards of the profession during the time of the acts for which these petitioners were indicted were themselves in a state of flux, petitioners should not have been subjected to Jury Instruction No. 35. United States v. Harris 347 U.S. 612 (1954); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

CONCLUSION

For all of the foregoing reasons a Writ of Certiorari should issue.

Respectfully submitted,

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